Sagau Batu Bala v Zaharah Mustapha Raja Sewa & Ors

HIGH COURT (MIRI) — CIVIL SUIT NO MYY-22–33/10 OF 2012
MAIRIN IDANG JC
30 NOVEMBER 2016

Civil Procedure — Jurisdiction — High Court — Whether deputy registrar of High Court and High Court judge had jurisdiction to hear parties on inclusion of documents in record of appeal which had already been filed with the Court of Appeal — Rules of the Court of Appeal 1994 r 18(6)

The crux of the present case was in respect of an issue related to the provision of r 18(6) of the Rules of the Court of Appeal 1994 ('the Rules'), namely whether the court could still hear the parties on the inclusion of documents in the record of appeal ('ROA') which had been filed with the Court of Appeal.

Held, dismissing the hearing with costs of RM1,000:

(1) Neither the deputy registrar nor the High Court judge had the jurisdiction to hear the parties on the ROA which had already been filed. Rule 18(6) of the Rules does not deal with a filed ROA, it deals with the preparation of ROA hence it was too late now for the parties to resort to r 18(6) of the Rules. In totality, the court had no jurisdiction to hear the parties on documents to be included or excluded in the filed ROA (see para 13).

[Bahasa Malaysia summary

Teras kes ini adalah mengenai isu berkaitan kepada peruntukan k 18(6) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah-Kaedah'), iaitu sama ada mahkamah masih boleh mendengar pihak-pihak atas kemasukan dokumen-dokumen di dalam rekod rayuan ('RR') yang telah difailkan di Mahkamah Rayuan.

Diputuskan, menolak pendengaran dengan kos sebanyak RM1,000:

(1) Tidak timbalan pendaftar ataupun hakim Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar pihak-pihak atas RR yang telah difailkan. Kaedah 18(6) Kaedah-Kaedah tidak berurusan dengan RR yang difailkan, ia berurusan dengan penyediaan RR maka ia adalah terlalu lambat sekarang untuk pihak-pihak merujuk kepada k 18(6) Kaedah-Kaedah. Keseluruhannya, mahkamah tidak mempunyai bidang kuasa untuk mendengar pihak-pihak atas dokumen-dokumen untuk

dimasukkan atau dikecualikan di dalam RR yang difailkan (lihat perenggan 13).] A

Notes

For cases on High Court, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5776–5862. B

Cases referred to

Badan Peguam Negara v Kerajaan Malaysia [2009] 2 MLJ 161, FC (refd)

Legislation referred to C

Rules of the Court of Appeal 1994 rr 18(6), 21

Pauline Sagau (Sagau, Raja & Co Advocates) in the original action for the plaintiff.

Keith Chin (Yong Wong & Chin Advocates) in the counterclaim for the first and second plaintiffs. D

Pauline Sagau (Sagau, Raja & Co Advocates) in the counterclaim for the first and third defendants.

Keith Chin (Yong Wong & Chin Advocates) in the original action for the first and second defendant. E

Leslie Linton (Janting Antalai with him) (Battenberg & Talma Advocates) in the original action for the third defendant.

Marjanah Adenan (Legal Offcier, State Attorney General's Chambers) in the counterclaim for the fourth and fifth defendants.

Leslie Linton (Janting Antalai with him) (Battenberg & Talma Advocates) in the counterclaim for the eighth defendant. F

Mairin Idang JC:

[1] The deputy registrar High Court Miri had vide his letter dated the 20 October 2016 forwarded to me the following documents: G

(a) submission in reply for and on behalf of the plaintiffs (original action) and as the first defendant and the third defendant (counterclaim);

(b) the plaintiffs (original action) and as the first and third defendants (counterclaim) bundle of authorities; H

(c) affidavit in opposition by Mr Janting ak Antalai (encl 279);

(d) submission: appointment before DR to resolve dispute in record of appeal (encl 280); I

(e) bundle of authorities;

(f) reply for the appellants, Zahara Mustapha Raja Sewa and Mustapha Raja Sewa Abdullah (encl 282);

(g) summary submission in reply for Zaharah Mustapha Raja Sewa and Mustapha Raja Sewa Abdullah (encl 283); and

(h) bundle of authorities No 1 for Zaharah Mustapha Raja Sewa and Mustapha Raja Sewa Abdullah.

[2] The subject matter of the letter from the deputy registrar ('DR'): 'Submissions to Resolve Dispute in Record of Appeal'.

[3] The DR had referred to me these documents to enable me to deliberate whether this court could resolve the dispute involving documents in the record of appeal ('ROA'). The DR was of the view it would be proper to place such dispute before me being the judge having presided and disposed of the case which is now the subject of an appeal before the Court of Appeal.

[4] I have read those documents and it was clear to me that the appointment before the DR was given by the deputy registrar of the Court of Appeal.

[5] On the 24 November 2016 at the Miri High Court I sought further clarification from counsels in attendance namely, Mr Keith Chin counsel for Mustapha and Zarah, Ms Pauline Sagau counsel for Sagau Batu, Mr Leslie Linton and Mr Janting ak Antalai counsels for Laju Balang.

[6] From the clarification Mr Keith Chin was of the view that I have the discretion to resolve the dispute pertaining to the ROA and to direct such documents to be placed in the relevant part of the ROA so that all documents are properly before the Court of Appeal. He also said there is no prejudice to the respondents.

[7] Mr Leslie Linton was of the view that the High Court has no jurisdiction to entertain this appointment as the ROA had already been filed with the Court of Appeal ('the filed ROA').

[8] Ms Pauline Sagau also concurs with Mr Leslie Linton on this lack of jurisdiction of the High Court once the ROA had been filed.

[9] I have read the parties' submissions it is very clear that the contentious issue is with regards to the provision of r 18(6) of the Rules of the Court of Appeal 1994 ('r 18(6)'), namely whether I can still hear the parties on the inclusion of documents to be included in the filed ROA.

[10] Now r 18(6) of the Rules of the Court of Appeal 1994 states:

(6) A *draft index of the documents* to be included in the record of appeal shall be sent

by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents (more particularly such as merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. *Where in the course of preparation of the record* one party objects to the inclusion of a document on the ground that that it is unnecessary and irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to. (Emphasis added.)

[11] Mr Leslie Linton said: 'The matter now being dealt with by the Honourable Court is in essence an application pursuant to Rule 18(6) ... *'In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court ...'*. It is also his submission that since the ROA had been filed before the Court of Appeal r 21 made provision for such amendment: 'The Court may at any time allow amendment of any notice of appeal, or notice of cross-appeal, or memorandum of appeal, or *other part of the record of appeal* on such terms as it thinks fit'. Mr Leslie Linton also submitted that 'Court' under the Rules refers to 'the Court of appeal and includes a judge of that Court'. (Emphasis added.)

[12] Learned counsel for Mustapha and Zarah submitted: 'On the 25/5/2016 the deputy registrar of the Court of Appeal Malaysia Tuan Muhammad Azzam Bin Zainal Abidin directed this hearing/appointment under Rule 18(6) before Your Honour DR Miri High Court to hear what items ought to be incorporated into the Appeal records for Appeal 9-01: This is proper and in accordance with the procedures set out in Rule 18(6) of the Rules of the Court of Appeal 1994'. But Mr Leslie Linton had referred to me the case of *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161 where the Federal Court had stated succinctly: 'We may add that if this court has no jurisdiction then the concession of the senior federal counsel or an agreement between her and the appellant's counsel does nothing to confer jurisdiction, consent cannot confer jurisdiction where none exists'.

[13] This is a case of 'act in haste and repent at leisure'. But to be fair learned counsel for Zarah and Mustapha, they did file a motion at the Court of Appeal pertaining to the ROA but only to withdraw on the hearing date. But my point is this. Had there been strict compliance of r 18(6), the parties would not now be coming back to the DR and the High Court as if to start all over again in the

preparation of the ROA. As I said the ROA has been filed, neither the DR nor the High Court judge has the jurisdiction to hear the parties on the ROA which had already been filed. I also agree with learned counsels for Laju Balang that r 18(6) deals with the preparation of the ROA that is to be filed which includes what documents are objected to and which are to be included or excluded. With respect, r 18(6) does not deal with a filed ROA, it deals with the preparation of ROA. It is now too late to resort to r 18(6). I therefore take note of the objection taken by learned counsels for the plaintiff and the third defendant in the original action on the ground that the court has no jurisdiction to hear the parties on documents to be included or excluded in the filed record of appeal. The hearing or appointment sought for is therefore dismissed with costs of RM1,000 each to be paid to the plaintiff and the third defendant in the original action.

Hearing dismissed with costs of RM1,000.

Reported by Dzulqarnain Ab Fatar